IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1971

RALPH SORIA,

Appellant,

v.

JOHN A. KENNEDY, ET AL.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

Brief for Appellant

WILLIAM E. CULLEN

JOHN A. GALBRAITH

Solicitors for and of Counsel for Appellant

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IN THE

Supreme Court

OF THE

UNITED STATES

No. 224

OCTOBER TERM, 1914

RUTH DORAN,

Appellant,

vs.

JOHN A. KENNEDY. ET AL.,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This action was brought by the plaintiff in error against the defendants to quiet title to Lot 4 and the W. ½ of the S. E. ¼ and S. E. ¼ of S. E. ¼, Section 26, Township 160 North, Range 28, West, Koochiching County, Minnesota, in the District Court of Koochiching County, Minnesota. praying that she be declared the owner in fee of

said premises and that defendants be declared to have no estate or interest therein.

When said action was brought on for trial in said District Court, certain admissions were made upon the record by the defendants and appellee herein. Thereupon the plaintiff in that action, and appellant here, moved for judgment upon the pleadings and admissions, which motion was granted. (Record Fol. 21) Judgment was thereafter entered in said District Court adjudging the appellant herein the owner of the property free and clear of any right. claim or demand upon the part of the appellee herein.

Appellee herein duly appealed from said judgment and decree to the Supreme Court of the State of Minnesota. That court reversed the judgment of the lower court in an opinion filed May 29th, 1913 (record pp 30-34). A dissenting opinion was filed by Chief Justice Brown (Record Fol. 64-65.) upon the controlling federal question here presented for review.

STATEMENT OF FACTS.

On November 12th, 1904, Edward O. Norton made a homestead entry under the homestead laws of the United States, for lot 4 and the W. ½ of the S. E. ¼, and the S. E. ¼ of the S. E. ¼ of section 26, township 160. North, Range 28 West, Koochiching County, Minnesota

On April 10th, 1906, said Edward O. Norton made final proof upon said homestead entry.

On September 6th, 1906, said Edward O. Norton died intestate. leaving him surviving Fred J. Norton, William Norton, Margie N. Norton, Harriet Roche, James Cummings and Ruth Doran,

this appellant, as his sole heirs at law and next of kin.

That the final receipt of the receiver of the United States land office was issued to and in the name of the said Edward O. Norton for said homestead tract, on *March 17th,* 1908; that thereafter and on *September 8th,* 1908, patent was issued by the United States under the homestead laws of the United States to said Edward O. Norton. in name.

That after the death of said Edward O Norton, the said Fred J. Norton, William Norton, Margie N. Murphy. Harriet Roche and James Cummings duly sold, assigned and transferred all their respective rights, title and interest in and to said lands and premises to this appellant.

On March 2nd, 1909 letters of administration upon the Estate of said Edward O. Norton were issued out of the Probate Court of Koochiching County, Minnesota, to the defendant, John A. Kennedy.

That thereafter on February 11th. 1910 an order of license to sell the real estate above described for the payment of an alleged indebtedness of said Edward O. Norton incurred and contracted by said Norton prior to his death, and prior to the issuance of the final receipt and patent herein, there being no other indebtedness and for the expenses of administration of said Estate, was by the Probate Court of Koochiching County, Minnesota, issued to said defendant John A. Kennedy as such administrator.

That thereafter and on the 16th day of April 1910, the said John A. Kennedy, acting as such ad-

ministrator, and by virtue of said order of license, made a public sale of said property to the defendant, George N. Millard.

Thereafter and on April 29th, 1910, the said Probate Court of Koochiching County. made an order confirming the sale by said administrator to said George N. Millard. That thereafter and on the 2nd day of May 1910, said George N. Millard sold and conveyed said real estate to the defendant, Paul Kennedy. (record, folio 22-23).

In support of her appeal to this Court from the judgment of the Supreme Court of the State of Minnesota, appellant filed the following specifications of error and they are now reiterated and set up.

SPECIFICATIONS OF ERROR.

1. The said Supreme Court erred in reversing the judgment of the District Court of Koochiching County, Minnesota herein and ordering judgment in favor of the defendants in error.

2. The said Supreme Court erred in holding and deciding that the Probate Court of Koochiching County. Minnesota had jurisdiction to appoint an administrator, and that it had jurisdiction to order a sale of this land.

3. The said Supreme Court erred in holding and deciding that this land was a part of the estate of the deceased Edward O. Norton, and that the Probate Court could authorize a sale of same for a debt contracted by him prior to the issuance of final receipt and patent.

4. The said Supreme Court erred in not holding and deciding in this case that neither the Pro-

bate Court of Koochiching County, Minnesota, nor any other State Court or tribunal erected under the laws or constitution of the State of Minnesota. had any right or jurisdiction whatever to make a judicial sale of land acquired under the homestead law of the United States, such as the land in controversy here, for debts accrued before final patent had issued, and it erred in not holdng that such sale as the one in this case was void in toto and ab initio, and that its validity might be disputed in any court and in any tribunal, directly or indirectly.

5. The said Supreme Court erred in not holdin and deciding that the sale herein made by the Probate Court of Koochiching County, Minnesota, in this case, was such a violation of the laws of the United States and of the compact under which Minnesota became a State that it could not be approved under any circumstances whatever.

6. The said Supreme Court erred in holding and deciding that this land was not exempt under the Act of Congress (U. S. R. S. Section 2296) and in holding that it was subject to sale for the debts of the decedent Norton incurred by him prior to the issuance of the patent for same.

7. That said Supreme Court erred in holding and deciding that the heirs of the decedent Norton had had their day in court, and that the Probate sale could not be collaterally attacked by them or attacked in the manner in which it was assailed in this action.

8. The said Supreme Court erred in holding and deciding that the land involved was the property of the deceased entryman Norton, and that the failure of the heirs to interpose the defense of ex-

emption under the Act of Congress (Section 2296 R. S. U. S.) against the original sale in Probate Court, constituted a waiver by the heirs of Norton of such exemption by acquiescence in the sale of the land from which it was in fact exempt.

9. The said Supreme Court erred in holding and deciding that the title to the land involved did not become vested in the heirs of Norton upon the issuance of patent after Norton's death as is provided by Section 2448 R. S. U. S.

10. The said Supreme Court erred in not holding and deciding that the legal title to the land was in the general government until the issuance of the patent and that when patent issued the entryman's equitable rights were extinguished and the lands became vested absolutely in the heirs of the deceased patentee, free from all debts incurred by him prior to the issuance of such patent, leaving no interest whatever in his estate.

11. The said Supreme Court erred in not holding and deciding that the title to the land upon the issuance of the patent, although issued in the name of decedent. passed directly to his heirs, was not part of decedent's estate, and that the Probate Court was without jurisdiction to order it sold.

ARGUMENT.

It clearly appears from the facts recited in the statement, as to which there is no dispute, that said Norton made homestead entry for the land involved on November 12th, 1904; that he made final proof on April 10th, 1906. That said proof was suspended; that said Norton died on September 6th. 1906; that final receipt was issued to him, in name, March 7th, 1908, and that patent issued

to said Norton, in name, September 8th. 1908; that letters of administration were issued to the defendant John A. Kennedy upon the Estate of said Norton on March 2nd 1909, upon a petition wherein he claimed to be a creditor and owner of the claim herein referred to, showing no assets except the land here involved, to which neither a final certificate nor patent had issued at the time of his death. That a pretended license to sell said land was issued by the Probate court of Koochiching County on February 11th, 1910, for an alleged indebtedness of said Norton, which said indebtedness was incurred and contracted by him during his life-time and made two years prior to the issuance of the patent for the land here involved. That on April 16th 1910, the administrator pretending to act under said license, sold said land to defendant Millard, who, on May 2nd, 1910, resold same to the defendant Paul Kennedy, who purchased said land with full knowledge of the foregoing facts and with knowledge of the fact that plaintiff claimed said land and claimed that the same was not subject to sale by said administrator and was exempt under Section 2296 of the Revised Statutes of the United States.

The Supreme Court of the State of Minnesota held that said pretended administrator's sale was valid and that said Probate Court had power and jurisdiction to make said sale and held that that Court's decree could not be attacked collaterally. This holding by the Supreme Court of the State of Minnesota is challenged by specifications of error numbered 2, 3, 8, 9, 10 and 11 as being unsound in law and in fact. For purposes of argument the various assignments alleged resolve themselves naturally into two propositions, viz..

(1) that the Probate Court had no jurisdiction to make said sale for the reason that the property attempted to be sold was not part of Norton's estate at the time of his death; (2) that even though Norton had an interest in this land which descended to his heirs, the same was not subject to sale for the payment of debts ante-dating the patent, being exempt by both State and Federal laws.

I.

THE PROBATE COURT HAD NO JURISDICTION OVER THE LAND HERE IN CONTROVERSY.

The constitution of Minnesota confers upon probate courts in this State "jurisdiction over the estates of deceased persons, and persons under guardianship", (Const. Art. 6, Sec. 7) but excludes authority beyond such limitations.

As aptly stated by the Court in the case of Fitzpatrick vs. Simonson Bros. Mnfg. Co., 86 Minn., 140-146 "there must be a death, the ownership of property by the deceased and there may be also that well recognized and important incident of probate authority,—the distribution of decedent's property among heirs or legatees. Proceedings in Probate Courts are most frequently instituted upon an application for the appointment of an executor or administrator, *but this is not the decisive test of its jurisdiction.* Jurisdiction in its final analysis is,

"The power to hear and determine a cause. * * * It is *coram judice,* whenever a case is presented which brings this power into action. If the

petitioner presents such a case in his petition, that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction."

Grignon's Lessee vs. Astor, 2 How. 319-338.

The jurisdiction and power to hear and determine a case in the Probate Court must therefore rest upon the basis of death and property, and the absence of either one of these elements is necessarily fatal to the exercise of power and jurisdiction.

The fact that Edward O. Norton is dead is not of itself sufficient as a basis for the exercise of jurisdiction by the Probate Court. At least one other essential element is necessary, viz., property to be administered. But Norton left no property and hence no jurisdiction.

THE LAND INVOLVED IN THIS CASE WAS NOT NORTON'S PROPERTY.

Norton had entered the land here involved as a homestead entryman under the laws of the United States, but no patent had issued to him at the time of his death. It is conceded that he had no other property rights. From the time of entry to the issuance of patent to him by the United States Government the entryman has certain possessory rights not here necessary to enumerate. But the entryman acquires, as against the United States, only the right to occupy the land entered for the purpose of performing the conditions which will enable him to acquire the title. He has no vested right until the conditions have been fully complied with.

Frisbie vs. Whitney, 9 Wall. (U. S.) 187;

The Yosemite Valley Case, 15 Wall. 77;

Hall vs. Russell, 101 U. S. 503.

As stated in Shiver vs. United States, 159 U. S. 491, 497, "*The land entered continues to be the property of the United States* for five years following the entry, and *until a patent is issued* * * * That meantime such settler has the right to treat the land as his own, so far, and so far only, as is necessary to carry out the purposes of the act."

He can of necessity obtain no title until the government divests itself of its title and confers it on the donee. The fact that final proof had been made before the register and receiver of the local land office before the death of Norton was not sufficient to confer such title in Norton as would be subject to descent under the laws of descent in this state as under the statute the action of these officers was reviewable by the officers of the General Land office who by law had jurisdiction to cancel the entry. *If those officers had issued a* final certificate it would merely have been prima facia evidence of the right of the entryman to a patent, as the power still rested with the land department, upon proper notice, to set aside and cancel the entry. and thus take away from him that prima facia evidence.

United States vs. Steenerson, 4 U. S. App. 332;

American Mort. Co. vs. Hopper, 56 Fed. Rep. 67; S. C. on Appeal, 29 U. S. App. 12.

In Guaranty Savings Bank vs. Bladlow, 176

U. S. 448, 454, in referring to a final certificate that had been issued, the court say:

"It does not transfer the title to the land from the United States to the entryman, and it simply furnishes prima facia evidence of an equitable claim upon the Government for a patent, and the use of the certificate for that purpose is subject to be destroyed by cancellation thereof under the direction of the department."

As title had not passed to Norton prior to his death, and he having no title, none could pass from him to his heirs, and as stated in Hall vs. Russel, 101 U. S. 503, 513, "if no provision had been made for a continuance of his possession the land would have become vacant on his death * * * Hence it was provided that the possessory rights of a deceased settler should go to his heirs. * * * but these were rights which HE COULD NOT TRANSFER, and which passed to them under the statute without any act of his."

Gould vs. Tucker, 20. S. D. 226; 105 N. W. 624.

Cutting vs. Cutting, 6 Sawy. 396; 6 Fed. 259.

Under the homestead laws, R. S. U. S. sec. 2291, Congress give the heirs of a settler the benefit of his rights and designate them as the recipient of the bounty of the government instead of him.

Gjerstadengen vs. Hartzell, 63 N. W. 230.

The statute (Sec. 2291) provides that, "No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within the two

years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisees; prove compliance with the provisions of the act, they shall be entitled to a patent, as in other cases provided by law." It has uniformly been held that such patent under this and similar acts passes TITLE DIRECTLY TO THE HEIRS as substituted beneficiaries, *who take by purchase and not by descent,* and that the title vests in such heirs by the grant, and not as successors to the interests of the deceased entryman.

Braun vs. Mathieson, 116 N. W. 789-790, and cases cited in the opinion.

As the land entered by Norton continued to be the property of the United States after entry, and until patent issued, the mere fact of death did not in any manner change it status as to him.

As was aptly stated by Corliss C. J., in Gjerstadengen vs. Van Duzen, (N. D.) 76 N. W. 233; "She filed upon it as a homestead in her lifetime, but she dies before the patent was issued and even before her right to demand a patent had accrued. *The law gave her no such interest in the land as could be transmitted by her to her heirs.* Upon her death all her rights in the land under her homestead entry ceased, and her heirs became entitled under the Statute, to a patent, *not because they had succeeded to her equitable interest, but because the law gave them a preference as new* homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. It is apparent from the Statute (Sec. 2291 Rev. St. U. S.) that Congress did not intend to vest in the homesteader an interest which could be inherited

under the laws of the State where the real estate might be situated, the same as other real estate, but to withhold from him such interest. and specifically designate the persons who, on his death should be entitled to secure the right which the original entryman would have obtained, had he survived. This view of the law is supported in

Bernier vs. Bernier, 147 U. S. 242.

Chapman vs. Price (Kan. Sup.) 4 Pac. 807.

Bernier vs. Bernier, 72 Mich., 43, 40 N. W. 50.

Haün vs. Martin, (Or.) 86 Pac. 371.

In Bernier vs. Bernier, 147 U. S., 242, the court says: "The object of the sections in question was, as well observed by counsel. to provide the method of completing the homestead claim and obtaining the patent thereof, and not to establish a line of descent, or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claims may be perfected, and a patent obtained, and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death."

As stated in Wadkins vs. Producers Oil Company 227 U. S. 368, 374,

"It is a definite grant of rights, and who shall be its beneficiaries are explicitly designated and upon what contingencies and upon the performance of what conditions. Until such contingencies happen and until such performance no rights vest."

Prior to the time of issuance of patent Norton's interest was essentially inchoate and ex-

clusively within the operation of the laws of the United States, and those laws, as we have seen, fully dealt with the subject of who should be the beneficiary of a compliance with them, thereby excluding State laws from that field.

As stated in McCune vs. Essig, 199 U. S., 381, 389.

It requires an exercise of ingenuity to establish uncertainty in these provisions. They say who shall enter and what he shall do to complete title to the right thus acquired. He may reside upon and cultivate the land, and by doing so is entitled to a patent. If he die his heirs are given the right of residence and cultivation, and "Shall be entitled to a patent as in other cases." The statute which gives him a right gives them a right. The heirs are as much beneficiaries of the Statute as he is. The words of the Statute are clear, and express who in turn shall be beneficiaries.

The State of Minnesota has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of the property of her citizens by descent, devise or alienation. But the property in question was a part of the public domain of the United States; Congress is invested by the constitution with the power of disposing of, and making needful rules and regulations respecting it.

Congress has declared by its legislation, that in such a case as this, a patent is necesary to complete the title. But in this case no patent was issued to Norton in his lifetime; and, therefore, by the laws of the United States the legal title has

not passed, but remains in the United States. As the title to this property was in the United States at the time of Norton's death, the Probate Court could obtain no jurisdiction over it.

It was held by the Supreme Court of Minnesota, however, that we are wrong in this contention of the law, that Court holding that after final proof the rule was different. namely that,

"A person who complied with all the requisites necessary to entitle him to a patent, * * * is to be regarded as the equitable owner of the land. * * * That when the right to a patent has once become vested, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it is complete, are the mere ministerial acts of officers charged with that duty."

And in support of its statement of the law cites the case of Wirth vs. Branson, 98 U. S. 118 121.

That was an action by rival claimants to the same land, both claiming the land under Government grants and has no application to the facts in this case. As between the entryman and the Government, the law as laid down by the Supreme Court of Minnesota, is undoubtedly correct; but as between the Government and a third person, the entryman's title is of necessity under the present law, inchoate until the divestiture by the Government of its title. The Supreme Court of Minnesota also cites the cases of Stark vs. Starrs, 6 Wall. 402. and of Barney vs. Dolph, 97 U. S., 652 upon the proposition that the execution and delivery of the patent after the right to it is complete, are

mere ministerial acts of the officer charged with that duty. That may be true under certain conditions, but not under the facts of this case. The two cited cases determine that to be the law under the facts there presented. Those cases both arose under the so-called Donation Act of Oregon, 9 Stat. at large, 496 as amended July 17th, 1854, 10 Stat. at large, 306. Under the original donation act there was a prohibition against the sale of the lands before patent. By the amendment to the act, this prohibition was repealed. In Barney vs. Dolph, supra, it was held that the repeal of that prohibition operated. under the circumstances, as a grant of power to sell the land even though a patent had not issued;" and held further, that *after this"* (the amendment) confessedly, all who had perfected their right to a patent for the lands they had occupied and cultivated for the requisite time * * * could sell and convey to the purchaser an indefeasible estate; there certainly does not seem to be any good reason why these special objects of regard should be made an exception to this general rule. It was part of the original donation system to keep all the donated lands from sale until the patents issue, but as soon as the patents were delivered all conditions were withdrawn and all restraints removed." These cases were decided under an exceptional policy of the United States in respect to the public lands in Oregon and was based upon the anomalous condition of the inhabitants of that territory when the Government of the United States exerted positively its jurisdiction over them. Barney vs. Dolph, 97 U. S. , 652-657. Under the Oregon Donation Act, then, title from the Government passed when the settler had proved "to the satisfaction of the

Surveyor General that he had complied with the act'' and having done that and having received a certificate from that official to the effect that he had made such proof the same amounted to a grant on the part of the Federal Government which authorized him under that Act to sell in the same manner as though patent had actually been delivered. That was a special bounty by the Government. Such is not the law, under the general homestead act, however, (Sections 2290-2291, R. S. U. S.,) the act under consideration here. Under the general homestead act, the Government does not divest itself of title and the homestead entryman can make no devolution of the land until after patent has actually issued to him from the Government. This distinction between the two acts is plainly sufficient to show the error into which the Supreme Court of Minnesota has fallen. Under the act involved in this case the entryman clearly had no right to dispose of the land until after the patent; no patent having issued there was no land to descend under the laws of descent of the State of Minnesota. Norton had no equitable title that could be operated upon by the laws of descent of the State of Minnesota. We most respectfully submit that that Court was in error when it held that the entryman ''may sell his interest, notwithstanding statutes which prohibit a sale before patent issues. If the law as thus stated by the Supreme Court of Minnesota is correct, the effect would be that the state of Minnesota and not Congress, had the power of disposing of the public lands of the United States, and of prescribing the rules and regulations of their disposition. That would be to make the laws of Minnesota paramount to those of Congress in relation to a

subject conferred by the Constitution to Congress only, and the practical result in this very case would be to take from the United States their own land against their own will and against their own laws. Wilcox vs. Jackson, 13 Peter, 498-517.

From the foregoing it will be seen that the land did not belong to the deceased and was not a part of the estate of deceased. That being so, it is obvious that the probate court was without jurisdiction to order a sale thereof. The land was the property of the heirs by grant direct to them from the United States under Sec. 2291, R. S. U. S. and they were still alive. The Probate Court possessed no jurisdiction over their property. It has power to act only when the estate is in fact the property of the decedent. All that it ever pretends to do in a proceeding of the character here assailed is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner thereof, nor can it decide such questions. These are elementary principles.

NORTON HAD NO TITLE IN FACT AND NONE PASSED BY THE SO-CALLED DEED OF THE ADMINISTRATOR.

The entire proceeding culminating in the alleged sale was absolutely void for want of jurisdiction in the Probate Court over the real estate over which it assumed to act. The land sold did not belong to the estate of Edward O. Norton. He filed upon it as a homestead in his lifetime, but he died before patent issued. The law gave him no such interest in the land as could be transmitted by him to his heirs. Whatever right he had under his homestead entry terminated at his death, and

the legal title to the land continued to be vested in the United States Government until patent was subsequently issued, when it passed directly to the heirs as new homesteaders.

Gjerstadengen vs. Hartzell, 83 N. W. 230.

Haun vs. Martin (Or.) 86 Pac. 371.

As was stated by Corliss, C. J., in Gjerstadengen et al., vs. Van Duzen et al, 7 N. D. 612, 76 N. W., 233, 234, "when the land directed to be sold is the property of a stranger, the Probate Court possesses no jurisdiction over such property; nor has it any power to try the question of title in such a proceeding, or at all. Should the owner of the land appear in the proceeding, and set up his title, and be defeated, it would nevertheless be true that the court would be without jurisdiction. For the statutes do not contemplate that a probate court shall hear and determine questions relating to the title to land. All that it ever pretends to do in a proceeding of the character of that here assailed is to order the sale of whatever interest the decedent may have had in the land at the time of his death. It never assumes to decide whether he was in fact the owner thereof."

The deceased, Edward O. Norton, had no interest in this property that could be sold. It is true that the patent issued to Norton, in name. some two years after his death but that fact did not confer any title on Norton. By the common law, a grant to a deceased person would be as ineffectual to pass title as if made to a fictitious person;

1. Jones on the Law of Real Property on Conveyancing, Sec. 223;

This rule would apply equally to grants of the government as to grants of individuals, but for the act of Congress of May 20, 1836, which obviates this result.

In holding that Edward O. Norton was the equitable owner of this land at the time of his death and that it descended according to the laws of the State of Minnesota, that Court, we most respectfully assert, was in error. That error on the part of the Court is tersely pointed out by Chief Justice Brown of that Court in his dissenting opinion and clearly requires no argument for its support. "The probate proceedings were commenced after the issuance of the patent and when, under section 2448, R. S. (U. S.) title to the land had become vested in the heirs of Norton. That statute provides:

'Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assignees of such deceased patentee as if the patent had issued to the deceased person during life.'

As I understand this statute the title to the land upon the issuance of the patent, though issued in the name of decedent, passed directly to his heirs, was no part of his estate and the probate court was without jurisdiction to order it sold. It is probable that, had the probate proceedings been commenced and the order of sale made after the acceptance by the Federal authorities of the final proof tendered by decedent, and before the issuance of the patent, a different question

would be presented. But the legal title to the land was in the general government until the issuance of the patent, and though decedent may have had an equitable title after the submission of final proofs, when the patent issued, such equitable rights were extinguished and the land became vested absolutely 'in the heirs * * * of such deceased patentee,' as declared by the statute quoted, leaving no interest whatever in his estate."

At the time that the patent issued, therefore, by virtue of the foregoing statute, it must be read as though the patent had issued to THE HEIRS of Edward O. Norton; the title actually did vest in them when the patent issued by virtue of the statute.

Galloway vs. Finley, 12 Peters. 264;

Davenport vs. Lamb, 13 Wall. 418;

In re Joseph Ellis, 21 Land Dec. 377.

THE FOREGOING WERE ALL MATTERS OF PUBLIC RECORD AFFECTING THE TITLE TO THE LAND IN CONTROVERSY AND THE DEFENDANTS WERE BOUND THEREBY.

While it is contended that the appellee, Paul Kennedy, is an innocent purchaser for value, this contention must, of necessity be held without merit in view of the public records. The law declares that the purchaser must see to it, at his peril, that the proceedings are legal, and that the land does in fact form a part of decedant's estate. Upon the face of the deeds from which appellee claims title it appears that no title was conveyed.

It is also contended that the appellant herein at no time objected to the proceedings on any ground whatever, nor to the sale of the real estate involved in this transaction, and the real estate passed into the hands of an innocent third person * * * without a suggestion that there were any heirs to object to the proceedings of the court, that this was a waiver of their rights.

The facts assumed in the foregoing quotation are not true, as a matter of fact; the records of the probate court show that this plaintiff. before the order of sale was made by the probate court filed the following protest, which, after the title, read as follows:

"Now comes Mrs. R. Doran, one of the heirs of Edward O. Norton, deceased, and hereby protests against the making by this court of any license to sell lot four and the W½ S. E.¼ and S. E.¼ S.E.¼, Section 26, Township 160, N., Range 28 West. This protest is made on the ground that said land is not subject to sale for the debts of said deceased because of the provisions of Section 2296 Revised Statutes of the United States which reads as follows:

> "No land acquired under the provisions of this chapter shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the patent thereof."

The protestant annexes hereto Exhibit "A" which is a certified transcript of the record of this land at the United States Land Office at Cass Lake. Minnesota, showing that said land was taken as a homestead entry by said Norton.

The facts were not concealed, but were, on the contrary, open to all parties.

But even if the owners made no objection to such sale the Probate Court would nevertheless be without jurisdiction. The Probate Court had no jurisdiction of the property of third persons and could acquire none, even by consent of the parties. The Constitution and Statutes of this State do not contemplate that a Probate Court shall hear and determine questions relating to the title to land. Such a matter is as much beyond the jurisdiction of the Probate Court as a suit in equity is beyond the jurisdiction of a justice of the peace. It is familiar law that consent will not vest in any tribunal power which has been withheld from it.

Gjerstadengen vs. Van Duzen, 76 N. W. 233.

II.

THE DECREE OF THE PROBATE COURT BEING VOID IS SUBJECT TO COLLATERAL ATTACK.

A.

It is conceded that the probate court is a court of superior jurisdiction and enjoys the same presumption of jurisdiction as superior courts of common law jurisdiction. That its orders, judgments and decrees are presumed to be within its jurisdiction, and are not subject to collateral attack for want of jurisdiction not affirmatively appearing on the face of the record. There is no presumption of jurisdiction in this case as this record impeaches itself. It shows the utter want of jurisdiction and the nullity of the decree, and

that may always be raised on the record, as it has been in this proceeding.

Culver vs. Hardenbergh, 37 Minn. 225, 231;

Sache vs. Wallace, 101 Minn. 169.

From the foregoing argument we believe we are justified in the assertion that the deceased was not the owner of the land which the court assumed to exercise its jurisdiction over. That the land was the property of the heirs and that the Probate Court, therefore, exceeded its jurisdiction and power in so far as it attempted to act upon the property of persons in esse. But that is not all.

THE PROBATE COURT HAD NO JURISDICTION TO ISSUE LETTERS OF ADMINISTRATION.

The record in this case further shows that the *letters of administration* issued in this case were wholly void, because the court was without jurisdiction to issue the same, as appears from the findings of fact by the trial court. These findings of fact are not disputed and have at no time been assailed, and are not now assailed. The court found that the only heirs of the deceased are the persons named in paragraph 5 of the findings of fact. (P. B. Fol. 22) It appears that Kennedy was not an heir. Hence he must have been and was appointed as a creditor, but the record shows that the only debt which constituted Kennedy a creditor was a debt which was incurred prior to patent. It appears that there were no other assets. Appellant claims therefore that it is manifest on the face of this record that Kennedy was not a lawful administrator, and not other than a

mere interloper. Section 3696, Revised Laws Minn. 1905 in paragraph 1, provides that the surviving spouse or next of kin or both may be appointed administrator. In the next paragraph of this section, it is provided that if the relatives refuse or neglect to act within thirty days that one or more of the principal *creditors* may be appointed. This record shows that Kennedy was appointed as a creditor; *it also shows that he was not a creditor because the debt asserted by him was not a lawful claim against the only asset purporting to belong to the estate.* The court must take judicial notice of this situation and as it is *clear that Kennedy* had no lawful claim against the only claimed asset of the estate *that he was not therefore such creditor as is contemplated by the statute.*

THESE ARE NOT MERE IRREGULARITIES. THE COURT'S ACTION IN THE ATTEMPTED APPOINTMENT OF THE ADMINISTRATOR AND THE ATTEMPTED SALE OF THE PROPERTY OF THE HEIRS WAS IN EXCESS OF ITS JURISDICTION, THEREFORE NULL AND VOID.

As aptly stated by the court in Carter vs. Steeves, 95 Minn. 225 "Whatever presumptions, resting upon considerations of public policy, or upon any other foundation, are allowed in behalf of the validity of the proceedings of a probate court, they cannot be permitted to overcome plain express provisions of statutes."

The question of collateral attack was considered lately by the supreme court of Minnesota, and Mr. Justice Brown, in the case of Sache vs. Wallace, 101 Minn. 167, 171, says:

"It is contended by the appellant that, conceding for the purpose of the point that the relief granted exceeded that to which plaintiff was entitled under the complaint, the inclusion thereof in the judgment was an error or irregularity not going to the jurisdiction of the court. to be corrected by motion or appeal within the time prescribed by statute for the correction of such errors; that the judgment, not having been so proceeded against, became, after the time for appeal had expired, final and conclusive to all the world. The merits of this contention depend wholly upon the question whether the embodiment of the excessive relief in the judgment was a mere irregularity, or whether it exceeded the jurisdiction and power of the court. If a mere irregularity, counsel's contention is sound. It is elementary that a judgment of a court of competent jurisdiction, after the expiration of the time of appeal, can not be impeached, either directly or indirectly for mere errors or irregularities not going to the jurisdiction of the court; but in all cases where the court exceeds its jurisdiction and want of jurisdiction appears upon the face of the record the judgment may be attacked at any time before or after the time for appeal, even by a person not a party to the action, but who is affected thereby in his property rights, Mueller vs. Reimer, 46 Minn. 314; 12 Enc. Pl. & Pr. 188; Phelps vs. Heaton, 79 Minn. 476."

"1. The courts are not in full harmony as to what constitutes an irregularity within the meaning of the rule referred to. Generally speaking, however, an irregularity may

be defined as a failure to follow appropriate and necessary rules of practice and procedure, omitting some act essential to the due and orderly conduct of the action or proceedings or doing it in an improper manner. 17 Am. & Eng. Enc. (2d Ed.) 481; Janues vs. Circuit Judge 42 Mich. 469; Holmes vs. Russell, 9 Dowl. 487. Errors or defects of this character that may be amended without prejudice to the absolute rights of the parties, do not affect the jurisdiction of the court to the extent that its final action is a nullity. But proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court have jurisdiction of the parties and subject matter of the action or proceedings, or not. utterly void. Ex parte Simmons 62 Ala. 416; Ex Parte Gibson 31 Cal. 620,91 Am. Dec. 546; Barton vs. Saunders, 16 Ore. 51, 16 Pac. 921."

Tested by the rules laid down in the foregoing case it will be readily seen that the court's action was in violation of statutory prohibitions, and that the want of jurisdiction of the probate court in these matters appear on the face of the record and that that question may be raised collaterally. There is nothing here on which to base a valid decree of the Probate Court.

B.

AS THE PROPERTY INVOLVED COULD NOT BE SOLD FOR PAYMENT OF DEBTS INCURRED PRIOR TO PATENT, IT COULD NOT BE SOLD FOR EXPENSES OF ADMINISTRATION INCURRED IN ATTEMPTING TO ENFORCE SUCH DEBT.

It apears from the findings of fact by the trial Court that the title asserted by the appellee herein arises from an administrator's sale of the land involved, which land was acquired under the homestead law of the United States, and which was sold for an alleged debt which was incurred prior to the issuance of final certificate and patent. It cannot well be disputed that a sale for such purpose is wholly and absolutely void and that such sale is contrary to the constitution of the State which binds the State to respect any regulations the United States might make in connection with the disposition of its public lands. Art. 2, Sec. 3, Minn. Constitution and Sec. 2296 R. S. U. S. It is not believed that the foregoing contention is seriously disputed by the appellee. But the suggestion is made that such sale of such land could be made and was lawful for the purposes of paying expenses of administration. But in this case the expenses of administration were incurred by a creditor who was administrator on his own petition, because he was a creditor, in an attempt to sell this land for a debt for which it could not lawfully be sold. The appellee's contention amounts to this, therefore, if we are correct that while the land *might not be sold for antecedent debts*, yet it might be sold for expenses incurred by the creditor administrator is seeking to enforce his antecedent debt. Thus a singular anomaly arises. The court is asked to say that even though no sale of this land could be made for debts incurred before patent, yet that it might be made for expenses incurred in seeking to subject the property to such debt.

It has been contended that the Probate Court of Koochiching County had full jurisdiction to

make sale of the lands involved herein for the purposes of paying the expenses and costs of administration, though no debts existed. This contention, is unsound in both fact and law. Deppe vs. Ford, 89 Minnesota, 253, has been cited, to support this contention of the appellee. The sale in the case just cited was made under the provisions of G. S. 1894, sections 4576, 4580. The sale in this case was made under Sections 3751 and 3753, Revised Laws of 1905, which repealed the G. S. 1894. There is a substantial difference between the statutes by which the court was guided in Deppe vs. Ford, Supra and the case at bar. Under the former statute it was provided that:

> "If it appears by such petition that there is not sufficient personal estate in the hands of an executor or administrator to pay the debts outstandng against the deceased, the legacies or the expenses of administration, etc., the court may order a sale."

Under the statute above quoted it is clearly provided that sale might be made for the expenses of administration; but the statute under which this sale was attempted to be made and which supercedes the statute controlling in Deppe vs. Ford, follow the former statute in its general lines but does not permit the sale of real estate for the expenses of administration alone. The governing paragraph of the existing statute is as follows:

"Section 3751. Real estate may be sold, when— The real estate of a decedent or ward may be sold under license of the probate court in the following cases;

1. When the personal estate of a dece-

dent is insufficient to pay his debts, the legacies, if any, and the expenses of administration, or the court shall deem it for the best interests of the estate and of all persons interested therein."

It will be noted from the foregoing that the legislature deliberately changed the word "or" to the word "and" and there was good reason for the change. The object was to prohibit the sale of real estate for the purposes of paying the expenses of probate court proceedings unless there be legacies to be paid or valid debts which would be a lien on the property. Can it be argued clearly that the word "and" in this statute should be read "or" when it is clearly perceived that the legislature were proceeding to prevent abuses which might arise in probate proceedings by reason of the sale of real estate merely for the purpose of paying small expenses of the probate court? The existing provision that sales may be made to pay debts and expenses of administration does not mean that they may be made for the purpose of paying probate expenses alone. It is contended by appellant on this point that a sale for the expenses of administration is entirely void and that the probate court had no jurisdiction to order a sale for such purposes. In view then of the facts that a sale could not be made merely for probate expenses, and the further fact that the debt in question could not be paid from a sale of the land acquired under the homestead law, on the face of this record the probate sale was wholly void. The probate court acquired no jurisdiction; its acts were outside of its authority and in direct contravention of statutory prohibition. These facts appearing on the face of the record, the de-

cree of the probate court could be attacked collaterally.

In other words, it is our contention that as the homestead itself could not be sold directly, it could not be sold indirectly by the process of administration as was attempted to be done in this case.

Towner vs. Rodegeb. 33 Wash. 153.

III.

EVEN THOUGH NORTON HAD SUCH PROPERTY RIGHTS IN THE LAND INVOLVED THAT IT VESTED IN HIS HEIRS, BY DESCENT, SAME WAS EXEMPT FROM SALE UNDER BOTH STATE AND FEDERAL LAWS FOR DEBTS INCURRED BY HIM PRIOR TO PATENT.

Assuming for the purposes of argument that the equitable title to land involved was vested in Norton's estate. In that event, immediately upon the death of Norton, the title became vested in his heirs, subject, under the laws of the State, only to the condition that it might be sold, if necessary, to pay the debts of the deceased. But, as the trial court pertinently queried "what debts could it be sold for? Not for any contracted before the issuance of the patent, according to the provisions of Sec. 2296 R. S. U. S. And, therefore, in this particular case, it could not be sold at all, as the title vested in the heirs without condition of any kind because as the patent did not issue until long after the entryman's death, no debts for which it could be sold could possibly exist."

Ash vs. Erickson, 132 N. W. 997 (Minn.)

Russell vs. Lowth, 21 Minn., 167;

Coleman vs. McCormick, 37 Minn. 179;

Van Doren vs. Miller, 85 N. W. (S. D.) 187;

Brandhoefer vs. Bain, 45 Neb. 781. 64 N. W. 213;

Duell vs. Potter, 51 Neb. 241, 70 N. W. 932;

Nash vs. Farmers' & M. Bank, 3 Kan. App. 691;

Clark vs. Bayley, 5 Or. 343;

State vs. O'Neil, 7 Or. 141;

Faul vs. Cooke, 19 Or. 455;

Wallowa N. Bank vs. Riley, 29 Or. 289;

Miller vs. Little, 47 Cal. 348;

Baldwin vs. Boyd 18 Neb. 25 N. W. 580;

Gile vs. Hallock 33 Wis. 523;

Newton vs. Summey, 59 Ga. 398;

Sprinkle vs. West (Wash.) 114 Pac. 430, 34 L. R. A. (N. S.) 404 and note.

Section 2296 Revised Statutes of the United States provides that, "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debts contracted prior to the issuing of the patent therefor."

The entryman died more than two years prior to the issuance of the patent, and it is conceded that the indebtedness was created before patent issued. To subject this land, then. to the payment of the prior debts of the entryman, would be a direct violation of the Federal Homestead Law,

which in terms clearly exempt all lands patented under the homestead act from liability for any of the debts of the patentee contracted prior to the issuing of the patent. That act on the part of the Federal Congress was not against any State Constitutional inhibition. As was stated in Gibson vs. Chouteau, 13 Wall 92 by Mr. Justice Field on page 99, "With respect to the public domain, the constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitation. Congress has the absolute right to prescribe the times, the conditions and the mode of transferring the property, or any part of it, and to designate the persons to whom the transfer shall be made. No State Legislature can interfere with this right, or embarrass its exercise; and to prevent the possibility of any attempted interference of it a provision has been duly inserted in the compacts by which new states have been admitted into the Union that such interference with the primary disposal of the soil by the United States shall never be made."

Such provision was inserted in the act authorizing the people of Minnesota to form a constitution, state government, etc., and it is embodied in the present Constitution of this State. with the further clause that: "this state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof." Const. Minn. Article 2 Section 3. This provision of the state constitution is an express constitutional inhibition of the power of the state legislature to pass any law interfering with the

primary disposal of the soil by the United States or by any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof. As was stated by our own Supreme Court, in passing upon the constitutionality of Sec. 2296 R. S. U. S., in the case of Russell vs. Lowth, 21 Minn. 167-170: "What are needful rules and regulations for this power of disposal, is a question of legislative discretion, and its exercise by Congress will not be interfered with by the Judicial tribunals of the country."

In the case of Coleman vs. McCormick 37 Minn., 179, the Supreme Court of Minnesota in passing upon the provision of Sec. 2296 R. S. U. S., after setting out the wording of that Statute, in full states, "The plaintiff's title was acquired under the provisions of this chapter, and, according to the terms of the law, it was exempt. The statute provides specifically for the acquisition of a patent by the homestead settler, or. in case of his death, by his widow, or, she having died, by his heirs or devisee, or, in case the entry is by a widow, then upon her death, by her heirs or devisee. Bearing in mind the specific provision thus made, empowering these different classes of persons to secure the title under this law, it is difficult to construe the unqualified language of the exemption as being applicable to one of the specified classes, but not to the others. It is, of course, effectual as to the original homestead settler. There would seem, too, to be no doubt of its applicability, where the widow of the settler, or, she dying, his minor children, the members of his family, perfect the title in themselves, so that they would hold the land free from liability for any prior debts which they might have contracted.

Such cases are clearly within the benificent purpose of the homestead law, and within the terms of the section declaring the exemption."

"It may be said that the law was not framed for the benefit of more remote heirs of the homestead settler, not members of his family, and not dependent upon him for support, nor for the benefit of devisees not of kin to the testator, and that, therefore, the exemption does not attend the title acquired by such persons. But it is impossible by any process of judicial construction to determine that the exemption, which in terms is applicable to heirs and devisees without distinction, was intended to apply only in favor of certain heirs and devisees, and not applicable as to others. The statute affords no indication that any distinction is to be made. nor anything by which a court could be guided in declaring what patentees under this law are within the exemption, and what are not. Such distinctions can only be made arbitrarily, and this would not be construction, but legislation. Upon what ground, for instance, could it be declared that the exemption is effectual as to minor heirs, or to those who were dependent upon the homestead settler for support, but that it is inapplicable as to others? or that a widow or child to whom the settler has made devise may acquire the patent with the benefit of the exemption, but that as to a father, a mother. a brother, who as devisee acquires the patent, the exemption does not apply? We are of the opinion that as to the widows, heirs, or devisees of deceased homestead settlers, acquiring title in accordance with section 2291, no distinction is to be made as to the attendant exemption; but that it is effectual in favor of all. Giving this effect to the law accord-

ing to its plain terms will doubtless result in the acquisition of some patent titles, with the attendant exemption, by persons other than those for whose benefit the homestead law was especially designed; but such cases will be relatively few, and they are the incidental results of the policy of congress to impose no limitation or distinction as respects the inheritance of the homestead, or the power of the settler to transmit by devise, even before his own title has been perfected."

The holding that when the entryman dies before the issuance of the patent, his widow and heirs have the right to acquire title to the homestead and hold the land free from the claim of creditors of the original entryman, has also been upheld in Sorrel's vs. Self, 43 Ark. 451, and in Towner vs. Rodegeb, 33 Wash. 153. In the last case cited it was held that, "Where the entryman died intestate before the issuance of a patent, and his administrator sold the land for the purpose of paying the debts of the deceased, *and the expenses of the administration*, the court, in holding that the sale was void, said: "If the homestead itself, with the title acquired, cannot be subjected to liability for debts contracted before the issuance of patent, it would seem to follow with equal force that the homesteader's mere right to possession of land, not even entered, together with his improvements thereon, is likewise exempt from such liability. If execution for debts contracted before patent cannot be enforced against a homestead, either acquired or inchoate, it follows that such debts cannot be enforced against it by the processes of administration, as was attempted to be done in this case. If the improvements and right

of possession of the settler when living cannot be sold to satisfy his debts, the mere fact of death does not change the principle."

Towner vs. Rodegeb, (1903) 33 Wash. 153.

The courts have uniformly given effect to this provision (Sec. 2296 R. S. U. S.) as a condition attached to the grant of the land which inures, not only in favor of the patentee, but also in favor of his grantees.

Brandhoefer vs. Bain, 64 N. W. 213;

Smith vs. Steele, 13 Neb. 1, 12 N. W. 830;

Baldwin vs. Boyd 18 Neb. 444 25 N. W. 580;

Jean vs. Dee, 5 Wash. 580, 32 Pac. 460;

Sorrels vs. Self, 43 Ark. 451;

Miller vs. Little, 47 Cal. 348;

Gile vs. Hallock, 33 Wis. 523.

We most respectfully submit that the record discloses that the Probate Court never had or acquired any jurisdiction of the estate of Edward O. Norton, because;

(1) Edward O. Norton left no estate to be administered upon;

(2) The land included in the homestead entry of Norton to which no patent had issued passed directly to his heirs upon his death, *by purchase.* and not by decent;

(3) No administrator was or could be legally apointed by the Probate Court;

(4) If Norton had any interest in the land which descended to his heirs, it was not subject to the payment of debts antedating the patent, and any steps taken by the Probate Court with that

purpose in view are null and void, and could in no way affect the title to the land in question;

(5) The act of the Probate Court being a nullity, no direct action was necessary for the purpose of purging the records.

For the foregoing reasons we respectfully submit that the decision of the Supreme Court of Minnesota should be reversed and appellant declared to be the owner of the land free and clear of all incumbrance.

WM. E. CULKIN and

JOHN E. SAMUELSON,

Solicitors for and of Counsel for Appellant.

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IN THE

Supreme Court

OF THE

UNITED STATES

No. 224

RUTH DORAN,

Appellent,

vs.

JOHN A. KENNEDY, ET AL,

Appellee

BRIEF OF RESPONDENT AND DEFENDANT IN ERROR

STATEMENT

The facts in this case are sufficiently stated in the record and again in Appellant's Brief, and it would serve no useful purpose to here repeat and reiterate them.

There is no disposition on the part of the defendant in error to question or criticise the Findings of Fact by the trial court, but the record

contains the pleadings from which the Findings were made and this appeal is upon the record and all that it contains. The only Federal question involved in this case is the interpretation and construction of Section 2448 of the Revised Statutes of the United States under which the appellant and plaintiff in error claims title. All other questions of fact or of law determined by the state court are final and present no Federal question on this appeal.

ARGUMENT

That Edward O. Norton made a homestead entry, made proof thereon and died leaving him surviving the plaintiff in error and other heirs to whose rights she has succeeded, and that upon the petition of defendant in error, J. A. Kennedy, he was appointed administrator of the estate subsequent to the issuance of patent upon the homestead entry and that pursuant to his duties as administrator of such estate, and upon his application, the land involved in this controversy was sold to pay the debts of decedent and the costs of administration, there is no dispute. Nor is it disputed that the plaintiff in error took part in the probate proceedings, and never appealed from any order or decree of said court, and by reason thereof became estopped from attacking the decree of said court collaterally, in case it had jurisdiction, as found by the Supreme Court of Minnesota. There is no doubt that the Finding of the Supreme Court of this state as to the question of waiver or estoppel is conclusive as to that question and binding upon this court.

If Edward O. Norton, at the time of his death, was seized of real estate or any interest therein descendable under the laws of the State of Minnesota, the Probate Court of Koochiching County had jurisdiction in this case, and all of its acts after that jurisdiction was invoked were valid and binding and not subject to collateral attack. Therefore, there is but one question for this court to determine, and that is as to whether or not at the time of Norton's death, under the Public Land Laws of the United States, he was possessed of such title as descended to his heirs, under the Laws of Descent in this state.

I.

THE PROBATE COURT OF KOOCHICHING COUNTY, MINNESOTA, HAD FULL JURISDICTION OVER THE LAND EMBRACED IN THE HOMESTEAD ENTRY OF EDWARD O. NORTON.

The Homestead Entry of Edward O. Norton was consumated at the time he made final proof April 10, 1906, and from that date until his death September 6, 1906, he was seized of the equitable title to the land embraced in his entry. His death and his equitable title to this land gave the Probate Court of Koochiching County jurisdiction over that estate.

His heirs took the homestead under the Laws of Descent of the State of Minnesota, as provided in Section 2448 of the Revised Statutes of the United States, which provides as follows:

"Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall enure to and become vested in the heirs, devisees, or assignees of such deceased patentee, AS IF PATENT HAD ISSUED TO THE DECEASED PERSON DURING LIFE."

Accordingly, a patent that would otherwise be void because having issued to a deceased person is validated and vitalized by means of this curative enactment, and the title to the land vests in the heirs, devisees, or assignees of the decedent in the same manner and to the same extent that it would have vested had the patent issued to him during life.

Tarver vs. Smith, 38 Ala. 135.
Schedda vs. Sawyer, 4 McLean 181.

The heirs take, under this statute in the same manner as if patent had issued to Norton during his life. Had patent issued to Norton during his life the land in question would have descended to plaintiff in error under the laws of descent of the State of Minnesota. He would have died seized of these lands constituting his estate, and the Probate Court of Koochiching County, Minnesota, would have had jurisdiction of his estate.

"We think it quite clear, if this

patent had issued to Besion in his life time, the title would have enured to his grantee."

Crews vs. Burchman, 1 Black 352, 17 L. ed. 91.

Leonard vs. Ross, 23 Kan. 292.

In the case of Johnson vs. Parcels, 48 Mo. 549, the court, after quoting Section 2448 U. S. R. S., said:

"This clearly shows that a descent of the premises was contemplated. Had the person lived and the patent been issued to him during his life time the act would have been useless for the land would have descended to the heir, devisee or assignee in the very manner directed, but being dead the law relates the title back to the time when he was living, and for all the purposes of descent and distribution invests him with the title."

The Ohio court in passing upon the same subject, and in construction of the same statute, said:

"The design of this act was * * * merely to give the effect to patents that, but for the act, would be void because issued to a deceased person."

Stublefield vs. Boggs, 2 Ohio 216,

McArthur vs. Dunn, 7 How. 262.

"The act of Congress (2448) then in no sense can vest Kerr's heirs with

> the legal title nor does it execute a simple trust; but divests the legal title, conferred by the patent, in the channel of inheritance or purchase."
>
> Lessee of Trimble vs. Boothby, 14 Ohio 109.

II.

THE WORDS OF THE STATUTE EXPLAIN THEMSELVES.

The Word "heir" or "heirs" used in the statute is unquestionably used in its ordinary legal sense and clearly shows the intention of Congress as directing, as far as it could, the title to former public lands to which the right of patent had accrued to the entryman, but to whom patent had not issued during life. A few of the common definitions of the word 'heirs' as laid down by the various courts show what was in the mind of Congress in using that term in the statutes.

> "Ordinarily used to designate those persons who answer this description at the death of the testator. In its strict and technical import applies to the person or persons appointed by law to succeed to the estate in case of intestacy."
>
> Bouvier's Law Dictionary, 941.
> 2 Black Com. 201.
> 53 Ill. 62.
> 139 Ill. 433.

"The word heirs embraces all legally entitled to partake of the inheritance." 83 Va. 724.

"An heir is one who takes by descent."

Inhad. of Elliott vs. Spinney, 69 Me. 31.

"An heir is he who succeeds by descent to the inheritance of an ancestor, and in this sense the word comprehends all heirs."

Ward vs. Stow, 17 N. C. 509.

Merrill vs. Atkins, 59 Ill. 18-21.

Henry vs. Henry, 31 N. C. 278.

"Heirs are those persons in whom real estate vests by operation of law on the death of one who was last seized."

Dukes vs. Faulk, 37 S. C. 255.

III

THE PLAINTIFF IN ERROR CONFUSES SECTION 2291 WITH SECTION 2448 OF THE REVISED STATUTES OF THE UNITED STATES, AND THE FIRST SECTION IS NOT IN POINT.

Section 2291 U. S. R. S. to which the court's attention has been directed by Appellant and Plaintiff in Error has no application to the facts in this case. That section provides certain beneficial legislation in the interest of the widow and children, or

near of kin, of a homesteader who dies before final proof and earning the right to a patent. All of the cases cited by Plaintiff in Error with respect to the question of title are cases arising under Section 2291 and not under a condition of facts as in this case, which bring the case within the provisions of Section 2448 U. S. R. S, as heretofore stated.

There are few cases directly in point, if any. The nearest are those which arose under the so-called Oregon Donation Act to which this court has repeatedly held the provisions of Section 2448 of the United States Statutes applied. The difference, however, if any exists, is in favor of the Plaintiff in Error in this case as the Oregon Donation Act did not use the term 'heirs' in providing for the vesture of title in case of the death of the settler, but used the words 'survivor, or children'. So that Plaintiff in Error can raise no objection to the law laid down in Stark vs. Starr, and other cases decided under the Donation Act. These cases laid down fundamental principals of real property, to a few of which the court's attention is directed.

IV

THE EQUITABLE TITLE TO THIS LAND PASSED TO EDWARD O. NORTON ON APRIL 10, 1906, WHEN HE HAD COMPLIED WITH THE TERMS OF HIS CONTRACT OF PURCHASE BY OFFERING FINAL PROOF AND PAYMENT.

"The execution and delivery of a patent to a person entitled thereto are

mere ministerial acts of the officers charged with that duty, and when the right becomes perfect the full equitable title passes to the purchaser or grantee with all the benefits, immunities and burdens of ownership and the government holds the naked legal title in trust for him."

32 Cyc, 1029-30

Section 41 Cent. Dig. Pat. Lands pp. 332

U. S. vs. Detroit Timber & Lumber Co., 200 U. S. 321 50 L. ed. 499.

"It is a general rule, in respect to the sale of real estate, that when a purchaser had paid the full purchase price his equitable rights are complete. and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the Land Department of the Government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or in other cases, all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party, in whom are vested

all the rights and obligations of ownership."

Benson Mining Co. vs. Alta Mining Co., 145 U. S. 428, 36 L. ed. 762.

"In every case when this court has been called upon to investigate titles, where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmee, and his heirs or devisees, in the same manner as if he had been vested with the legal title at the date of conveyance."

Landis vs. Brant, 10 How. 348; 18 L. ed 449.

"It is well settled that when lands have once been sold by the United States and the purchase money paid, the lands sold are segregated from the public domain and are no longer subject to entry. * * * Where the right to a patent has once become vested in a purchase of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent, after the right to it has become complete are the mere

ministerial acts of the officers charged with that duty."

Simmons vs. Wagner, 101 U. S. 260; 25 L. ed. 910-11.

Barney vs. Dolph, 97 U. S. 652; 24 L. ed. 1063.

Stark vs. Starr, 6 Wall 402 18 L. ed. 925.

Attorney General Speed, quoted by court in Frisby vs. Whitney, 76 U. S. 187; 19 L. ed. 668 says:

"The land continues subject to the absolute disposing power of Congress, until the settler has made the required proof of settlement and improvement, and has paid the required purchase money."

"There is no rule better founded in law, reason and convenience, than that all the several facts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."

Cruise on Real Property, Vol. 5. pp. 510-11.

"When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. * * * It is said the fee is

not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically at law, but not in equity. The land in the hands of the purchaser is real estate, decends to his heirs, and does not go to his executors or administrators."

Carroll vs. Safford, 44 U. S. 3; 11 L. ed. 671. 3 How. 441.

"The receipt is an acknowledgment by the government that it has received full pay for the land, that it holds the legal title in trust for the entryman, and will in due course issue to him a patent. He is the equitable owner of the land. It becomes subject to state taxation, and under the control of state laws in respect to conveyances, inheritances, etc."

U. S. vs. Detroit Timber Co., 200 U. S. 321-38.

Carroll vs. Stafford, 3 How. 441; 11 L. ed. 671

Witherspoon vs. Duncan, 4 Wall. 210; 19 L. ed. 339.

Simmons vs. Wagner, Supra;

Winona & St. P. Land Co. vs. Minnesota. 159 U. S. 526, 40 L. ed. 247; 16 Sup. Ct. Rep. 83

Cornelius vs. Kessel, 132 U. S. 456; 32 L. ed. 482; 9 Sup. Ct. Rep. 122.

Hastings & D. R. Co. vs. Whitney, 132 U. S. 357; 33 L. ed. 363; 10 Sup. Ct. Rep. 112.

Benson Min. & Smelting Co. vs. Alta Min. & Smelting Co., 145 U. S. 428; 36 L. ed. 762; 12 Sup. Ct. Rep. 877.

"In no just sense can lands be said to be public lands after they have been entered at the Land Office and the certificate of entry obtained. If public lands before the entry, after it they are private property. If subject to sale, the government has no power to revoke the entry or withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer and is a void act. * * * The Contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can and in the meantime holds the naked legal fee in trust for the purchaser who has an equitable title."

Witherspoon vs. Duncan, 71 U. S. 4 Wall. 210; 18 L. ed. 339.

In the case of Langdeau vs. Hanes, 21. Wall. 521; 22 L. ed. 467; 88 U. S., the court said:

> "In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey; but where it is issued upon the confirmation of a claim of a previously existing title it is documentary evidence having the dignity of the record of the existance of that title or of such equities respecting the claim as justify its recogniton and confirmation. The instrument is not the less afficacious as evidence of previously existing rights because it also embodies words of release for transfer by the government."
>
> Wisconsin Central Ry. Co. vs Price County, 133 U. S. 496; 38 L. ed. 637.

V

THE EQUITABLE TITLE HAVING VESTED IN NORTON PRIOR TO HIS DEATH AND PATENT HAVING CONFIRMED IT IN HIS ESTATE SUBSEQUENT TO HIS DEATH, THE PROBATE COURT OF KOOCHICHING COUNTY HAD JURISDICTION WHICH MIGHT BE INVOKED BY THE APPLICATION OF ANY PERSON CLAIMING AN INTEREST IN THE ESTATE, OR OTHERWISE, AS DISCLOSED BY THE RECORD.

Section 3696, Revised Laws of Minnesota: Who Entitled to Administration:

"Administration of the estate of a person dying intestate shall be granted to one or more of the persons hereinafter mentioned, and in the following order:

1. The surviving spouse or next of kin or both, as the court may dedermine, or some person selected by them or either of them, provided that in any case the person appointed shall be suitable and competent to discharge the trust.

2. If all such persons are incompetent or unsuitable, or refuse to accept, or if the surviving spouse or next of kin for thirty days after the death of the intestate, neglect to apply for administration, the same may be granted to one or more of the principal creditors, if any such are competent and willing to take it, or to some other person who may be interested in the administration of the estate.

3. If none of the persons mentioned in the preceding subdivisions of this section shall apply for administration within four months after the

> death of the intestate, the same shall be granted to any suitable or competent person interested in the estate by purchase or otherwise."

It must be apparent that when Norton died he was seized of an equitable interest and estate, at least, in his homestead entry which descended to his heirs under the Laws of Descent of the State of Minnesota. The probate Court of this county had jurisdiction by constitutional provision over the estate of deceased persons. It was only necessary then that a petition be addressed to the Probate Court reciting the death of the intestate and his interest in real estate within the county in order that the Probate Court might exercise its jurisdiction in the appointment of an administrator.

True, our statute, to which Plaintiff in Error has called attention, and heretofore quoted, provides to whom letters of administration may be issued, and the court's attention was directed on page 25 of Appellant's Brief to Section 3696 of the Revised Laws of Minnesota of 1905, with particular reference to paragraphs one and two of said section. Paragraph three of the same section has been construed by our court as giving power to the Probate Court in such cases as the instant case to grant letters to any suitable person. So that even were it conceded that Kennedy was not a creditor of the deceased, so long as the heirs, or next of kin, had for more than four months neglected and failed to petition for the appointment of an administra-

tor; (in fact for over a year and a half such neglect and failure had continued, as shown by the Findings of Fact of the trial court) then upon the presentation of a petition reciting the death of Norton and his possession of realty in the county, by any person, the Probate Court might appoint any suitable person as administrator.

It must be remembered that the burial expenses are a proper charge against the estate, and the person paying them becomes a creditor under the laws of this state.

Stanislaw Lis Estate vs. Westphal, et al 120 Minn. 143.

In the case last cited, Justice P. E. Brown uses the following language in referring to and construing subdivison 3 of the above quoted section 3696, R. L. Minnesota, 1905:

> "As this section now reads it requires, if literally interpreted, that the person appointed must be 'interested in the estate by purchase or otherwise'; but we cannot think that such is the law. Subdivision 3 was introduced into the statutes of the laws of 1893, Chapter 116, Section 7, and was carried into the statutes of 1894 as Subdivision 3 of Section 4478. It was as follows: 'If none of the persons mentioned in the preceding Subdivision of this Section applied for administration as therein pro-

vided within four months after the death of the intestate the same shall be granted to any suitable and competent person upon application being duly made to the Probate Court of the proper county by any person interested in the estate of the deceased by purchase from any of the heirs of the deceased. or otherwise'.

"The purpose of this provision is manifest. As the law stood before its adoption the court was without power to appoint a stranger even if all of the persons interested were unsuitable and incompetent or refused to accept the appointment, and this provision was adopted to remedy the shortcomings of the statute in this regard. Under Subdivision 2, both before and after the present revision, the court could, after thirty days, appoint a creditor or any other person 'interested in the administration of the estate'; and hence there was, and still is, no necessity for Subdivision 3, if taken literally, as at present written. But if this subdivision is taken as it stood prior to the revision, it fills a very important place in the law which otherwise would be incomplete and might at times prevent any administration of an estate at all.

> Under the rule of interpretation announced in Subdivision 1 of this opinion and applied in Subdivisions 2 and 3, we hold that Subdivision 3 must be read as it stood prior to the revision. Upon the trial of this case, therefore, it will be for the court, in the exercise of its discretion, to appoint and suitable or competent person as administrator of Stanislaw Lis." (120 Minn. 122).

Jurisdiction has been well defined by this court in the case cited in Appellant's Brief of Grignon's Lessee vs. Astor, in the following language:

> "The power to hear and determine a cause is jurisdiction; it is corum judice whenever a case is presented which brings this power into action; if a petitioner presents such a case in his petition that on a demurrer the court would render a judgment in his favor it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner required by law." (6 Peters 709) "Any movement by a court is necessarily the exercise of

jurisdiction and so to exercise any judicial power over the subject matter and the parties, the question is whether in the case before the court their action is judicial or extra judicial, with or without the authority and law to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction, what shall be adjudged or decreed between the parties, and with which is the right of the case is judicial action by hearing and determining it." (12 Peters 718; S. P. 3 Peters 205). "It is a case of judicial cognizance and the proceedings are judicial." (12 Peters 623).

"This is the line which denotes jurisdiction and its exercise in cases in personam, where there are adverse parties, the court must have power over the subject matter and the parties; but in a proceeding to sell real estate of an indebted intestate there are no adversary parties, the proceeding is in rem, the administrator represents the land. (11 S. and R. 432); they are analogous to proceedings in the admirality where the

> only question of jurisdiction is the power of the court over the thing, the subject matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the Orphans Court, and all courts that have power to sell the estate of intestates, their action operates on the estate, not on the heirs of the intestate, the purchaser claims not their title, but one paramount; (11 S. and R. 426) the estate passes to him by operation of law; (11 S. and R. 428) the sale is a proceeding in rem to which all claiming under the intestate are parties; (11 S. and R. 429) which directs the title of the deceased." (11 S. and R. 430).

On the question of collateral attack and the requirement of appeal, and also the rights of a purchaser under a decree of a Probate Court, the United States Supreme Court, in the same case last above quoted, has very well laid down the law in the following language:

> "The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given

from the final decree it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree it can be impeached only by fraud in the party who obtains it; (6 Peters 629) A PURCHASER UNDER IT IS NOT BOUND TO LOOK BEYOND THE DECREE; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which give them power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error; so where an appeal is given, but not taken in the time prescribed by law. These principles are settled as to all courts of record which have an original jurisdiction over any particular subject; they are not courts of special or limited jurisdiction; they are not inferior courts, in the technical sense of the term, because an appeal lies from their decisions. That applies to courts of special and limited jurisdiction which are created on

> such principles that their judgments, taken alone, are entirely disregarded and the proceedings must show their jurisdiction; that of the courts of the United States is limited and special and their proceedings are reversible on error, but are not nullities, which may be entirely disregarded." (3 Peters 205).

Paul Kennedy had a right to rely on the decree of the probate court, and as to him, at least, the question of exemption from debts cannot be raised in a collateral action. In the same case last above cited and quoted from, this court clearly defines his status as follows:

> "If the purchaser (under a decree of the Orphans Court) was responsible for their mistakes in points of fact after they had adjudicated upon the facts and acted upon them, those sales would be snares for honest men. (2 Peters 169) The purchaser is not bound to look farther back than the decree of the court. HE IS NOT TO SEE WHETHER THE COURT WERE MISTAKEN IN THE FACTS OF DEBTS AND CHILDREN. The decree of the Orphans Court in a case within its jurisdiction is reversible only on appeal and not collaterally in another suit. The title under a license to the administra-

tor to sell real estate is good against the heirs of the intestate although the license was granted upon the certificate of the Judge of Probate not warranted by the circumstances of the case.

"The license was granted by a court having jurisdiction of the subject; if it was improvidently exercised or in a manner not warranted by the evidence from the Probate Courts; yet it is not to be corrected at the expense of the purchaser who had a right to rely upon the order of the court as an authority emanating from a court of competent jurisdiction." (2 Peters 169--11 Mass. 227).

"We do not deem it necessary, now or hereafter, to retrace the reasons for the authorities on which the decisions of this court in that, or the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the states have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent

jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of those courts to whom the laws of the states confide full jurisdiction over the subjects.

"These sales are less expensive than when made on executions; more time is allowed to make them; the discretion of the court is exercised as to time, manner and the terms of sale; whereas on sales by the sheriff all is by compulsion and no credit is allowed; he cannot offer one entire piece of property for sale in parcels; the administrator can divide and sell as best subserves the interest of the heirs, and sell only so much as the emergency of the case requires.

"It has been contended by the plaintiff's counsel that the sale in the present case is not valid because Peter Grignon had no such an estate in the premises as could be sold under the order of the county court, it beng only an equitable one before the patent issued in 1829; but the title became a legal one by its confirmation by the act

> of Congress in 1823 which was equivalent to a patent. It was a higher evidence of title as it was a direct grant of the fee, which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers.
>
> "These views of this case decided it without examining the exceptions to the admission of evidence, or the ruling of the court on the instruction prayed, or their charge to the jury. So far as either were unfavorable to plaintiff they are most fully sustained by the foregoing principles and cases; the county court of Brown County had undoubted jurisdiction of the subject; their proceedings are irreversible; the title of the purchaser cannot be questioned."

In another part of the same decision with respect to jurisdiction this court laid down the following rule:

> "The true line of distinction between courts whose decisions are conclusive if not removed to an appelate court and those whose proceedings are nullities if their jurisdictions do not appear on their face is this: A court which is competent by its constitu-

> tion to decide on its own jurisdiction and to exercise it to a final judgment without setting forth in their proceedings the facts and evidence on which is is rendered, whose record is absolute verity not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appelate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show the jurisdiction and its lawful exercise, if of the latter description; every requisite for either must appear on the face of their proceedings or they are nullities."

In reviewing, on appeal, the right to set aside a sale under order of the Probate Court, of land subject to the exemption provided in Section 2296 U. S. R. S., by a collateral action, the Kansas Supreme Court said:

> "Our attention has not been called to any decision on the effect of an inadvertent or erroneous judgment of a court of competent jurisdiction denying the claim of exemption, when such judgment was collaterally attacked

as was done in this case. Upon principle, however, we are fully persuaded that such judgment can only be reviewed upon appeal, or other direct proceeding, and not in a collateral action"

Watkins vs. Mullen, 62 Kansas 1.

VI.

PLAINTIFF IN ERROR WAIVED HER RIGHTS OF EXEMPTION UNDER SECTION 2296 U. S. R. S. BY ACQUIESCENSE AND FAILURE TO APPEAL.

The court well said in this case (folios 60 and 61 of the record):

"If the determination of the Probate Court was wrong her remedy was to appeal from that determination. The heirs were entitled to one day in court, but not to two. When a Probate Court with jurisdiction over property for the purposes of administration and for purposes of sale in certain cases orders and confirms a sale of the same it is the right and duty of an heir to litigate the propriety of such orders in that proceeding. The heir cannot sit by, permit the sale to be made and then bring another and collateral action in another court to litigate again the propriety of the

sale and to procure a decree declaring it to be void."

It is true that Section 2296 of the Revised Statutes of the United States exempts the homestead from all debts contracted prior to the issuance of patent, and that this exemption follows the land and enures to the benefit of the heirs and grantees of the entryman. This exemption is a privilege which may be waived the same as any other privilege granted by constitution or statute. Such waiver was made by the heirs in this case upon their failure to appeal from the decision of the Probate Court when it ordered that the homestead be sold.

The Appellant, on page 22 of Appellant's Brief, sets out in full a certain protest which it is claimed was filed in the Probate Court. This protest does not appear in the record in this case, and is no part of the case, but even if it were filed it should have been followed up by an appeal when the Probate Court failed to grant the exemption claimed, and overruled the objection by ordering the lands sold.

This protest is only useful to show that Appellant was aware of the Probate proceedings and of her rights therein. That she actually took part in the proceedings and when overruled on her objections failed to follow up and preserve her rights.

This point is very well covered in the decision written by Justice Corliss in the North Dakota Supreme Court in the case of Gjerstadengen vs. Van Duzen, in the following language:

"When it is established that the lands did in fact belong to the decedent, then it is immaterial that it was exempt from sale for the debts for which it was ordered to be sold. The Probate Court in the supposed case has full jurisdiction over the property because it forms a part of the decedent's estate. Whether it shall be sold for said debts, is a judicial question, to be decided by the court, the same as any other question that arises in the course of the proceedings over which it clearly has jurisdiction. All persons who claim under decedent, whether as heirs or as devisees, are parties to the proceedings; and they must therein assert the exemption of the lands from liability to sale, if they intend to invoke the protection of the law at all. The question before the court is whether the particular land of the decedent shall be sold for debts, and all parties interested must then and there interpose any defense to a sale thereof which they may have, whether it relate to the existence of the alleged debts at all, or, conceding the claim to be valid, asserts that for such debts the lands cannot be sold, because of the exemption thereof under the Federal Statutes. It is

> now too late for the parties, so far as they claim the land as heirs to insist that the property ought not to have been sold." (76 N. W. 233).

VII.

THE QUESTION OF WAIVER IS NOT A FEDERAL QUESTION AND THE DECISION OF THE STATE COURT ON THAT POINT MUST STAND AS CONCLUSIVE, THERE BEING NO QUESTION OF THE RIGHT OF PLAINTIFF IN ERROR TO WAIVE HER STATUTORY EXEMPTION UNDER SECTION 2296 OF THE UNITED STATES STATUTES.

This court has several times ruled upon the question of waiver and estoppel in such cases, but it is clear from those decisions that the question of waiver is not a Federal question, and having been decided adverse to the Appellant in this case by the Supreme Court of this state, as shown by the opinion of the Supreme Court of Minnesota, (record folios 60 to 63 inclusive). Such decision is final and an appeal from such portion of the opinion does not lie nor does it raise a Federal question for review by this court.

> "After the confirmation of the sale of April 19, 1864, before any deed had been made, and while the cause was upon reference for a statement, as well of the trustee's accounts as for distribution of the fund realized by

the sales. Kirk, it seems, appeared before the auditor, by an attorney, and made objection to the allowance of the simple contract debts which had been proven against him in his absence. So far as the record discloses, no other objection to the proceedings was interposed by him. Undoubtedly, he then knew, (he must be conclusively presumed to have known) after he appeared before the auditor, all that had taken place in the suit during his absence from the District, including the sale of the premises in dispute, which took place only a few months prior to his appearance before the auditor. If that sale was a nullity, the court, upon application by Kirk, after his appearance before the auditor, could have disregarded all that had been done subsequent to the first sale, discharged Hamilton's bond, returned the money he had paid, and, in addition, placed Kirk in the actual possession of the property. No such application was made. No such claim was asserted. No effort was made by him to prevent the execution of a deed to the purchaser at the second sale. So far as the record shows, he seemed to have acquiesced in what had been done

in his absence. In 1868, three years after Hamilton had secured a deed in pursuance of his purchase, he became aware that Hamilton was in actual possession of the premises, claiming and improving them as his property. He personally knew of Hamilton's expenditures of money in their improvement, and remained silent as to any claim of his own. Indeed, his assertion while the improvements were being made, of claim to only three feet of ground next to the adjoining lot upon which he resided, was, in effect, a disclaimer that he had or would assert a claim to the remainder of the lots 7 and 9, which Hamilton had purchased at the sale in April, 1864. And his subsequent declaration that he was in error in claiming even that three feet of ground, only added force to his former disclaimer of title in the premises. Hamilton was in possession under an apparent title acquired, as we must assume from the record, in entire good faith, by what he supposed to be a valid judicial sale, under the sanction of a court of general jurisdiction.

"The only serious question upon this branch of the case is, whether,

consistently with the authorities, the defense is available to Hamilton in this action of ejectment to recover the property. We are of the opinion that the present case comes within the reason upon which rests the established exceptions to the general rule that title to land cannot be extinguished or transferred by acts in pais or by oral declarations. 'What I induce my neighbor to regard as true is the truth, as between us, if he has been misled by my asservation,' became a settled rule of property at a very early period in courts of equity. The same principle is thus stated by Chancellor Kent in Wendall vs. Van Rensselaer, 1 Johns. Ch., 344: There is no principal better established, nor one founded on more solid considerations of equity and public utility, than that which declares that a man who, knowingly, though he does it passively, looks on and suffers another to purchase and expend money on land, under an erroneous opinion of title, without making known his own claim, shall not be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by this equitable estoppel."

Kirk vs. Hamilton, 102 U. S. 75; 26 L. ed. 81.

> "A party may waive any provision either of the contract or of the statute intended for his benefit. If therefore it appears that the defendant waived his rights under the act of Congress: * * * if he did practically consent that the deposition should be taken and returned to the court as it was * * * and if by his waiver he has led his antagonist * * * if he refrained from making objections known to him in time when they might have been removed and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objection at all. If he may, he is allowed to avail himself of what is substantially a fraud."

Shutte vs. Thompson, 15 Wall. 123.

Section 7 of an act passed August 12, 1758, by the New Jersey Colonial Legislature provided as follows:

> "And be it further enacted by the authority aforesaid that the land to be purchased by the Indians as aforesaid shall not be hereafter subject to any tax, law, usage or custom to the contrary thereof in any wise notwithstanding."

This Court in upholding a levy of taxes upon land covered by the above act on the ground that the same had been taxed and the taxes paid for a long period of years, said:

> "Exemption from taxation being a special privilege granted by the government to an individual, either in gross, or as appurtenant to his freehold, is a franchise. Non user for either 60 years or even 30 years may be regarded as presumptive proof of its abandonment or surrender. The present case is a strong one. The non-user consists of acquiescence in actual taxation or an actual invasion of the franchise, year by year, for a period of years reaching almost beyond the memory of man. It is not merely a case of non-user but one of disaffirmance of the privilege for this one period."

New Jersey vs. Wright, 117 U. S. 648; 29 L. ed. 1021.

After reciting the facts this court said in Pierce vs. Summerset Ry., 171 U. S. 641:

> "It is thus seen that there were two questions determined by the state court; one related to the validity of the statutes passed subsequently to the execution of the mortgage, the court holding them valid, and that

they did not impair the obligation of the contract contained in the mortgage. That is a Federal question. The other related to the defense of estoppel on account of laches and acquiescence, which is not a Federal question. Either is sufficient upon which to base and sustain the judgment of the state court. In such case a Writ of Error to the state court cannot be sustained.

"A person may, by his acts or omission to act, waive a right which he might otherwise have under the constitution of the United States as well as under the statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal question."

"In the case of Eustis vs. Bowles, 150 U. S. 361, the state court held that by accepting his dividend under the insolvency proceedings Eustis waived his legal right to claim that the discharge obtained under the subsequent laws impaired the obligation of the contract. This court held that whether that view of the case was sound or not it was not a Federal question, and therefore not within the province of this court to inquire about."

Pierce vs. Somerset Ry., 171 U. S. 641; 43 L. ed. 316.

Even in the dissenting opinion of Chief Justice Brown in this case (folio 64 of the record) the Chief Justice concurs in all questions decided by the court so far as waiver is concerned. As to the position of the State of Minnesota in its former rulings on questions of this character, the court's attention is called to the following decisions:

Grover vs. Hardenburg, 37 Minn. 225.

Hanson vs. Nygaard, 105 Minn. 33. 8 Cyc. 804 (note 25).

Ladd vs. Waskopf, 62 Minn. 230.

Eddy vs. Kelly, 72 Minn. 32.

Bengtsson vs. Johnson 75 Minn. 321.

Fitzpatrick vs. Simmonson Bros., 86 Minn. 140.

Grignon's Lessee vs. Astor, 2 How. 319.

Kolars vs. Brown, 108 Minn. 60.

SUMMARY AND CONCLUSION.

From the foregoing authorities it is apparent

1. That Edward O. Norton died seized of the equitable title to the land involved in this action.

2. That when patent issued it confirmed the legal title in the estate left by Norton at the time of his death.

3. The Probate Court of Koochiching County had jurisdiction over this land as the estate of a deceased resident seized of real estate in said county at the time of his death.

4. The title to this land descended to the heirs according to the Laws of Descent and distribution of the State of Minnesota, and not otherwise.

5. Upon the failure of the heirs to act within a year and a half after the death of Norton, John A. Kennedy claiming the right as a creditor of said estate, validly invoked the jurisdiction of said court in the appointment of an administrator.

6. The jurisdiction of the Probate Court once being invoked by the appointment of an administrator continued throughout the proceedings including the sale of the real estate for the debts and costs of administration.

7. Whatever objections and rights Plaintiff in Error might have had as against the sale of the homestead for the debts of the deceased she has waived them by her failure to appeal and the state court's decision on that question is not subject to review in this court.

For these reasons, as well as for all the reasons given by the court below, and because of the settled policy of the law and the inequitable position of Plaintiff in Error, the decision of the Supreme Court of the State of Minnesota should and ought to be affirmed.

Respectfully submitted,

F. J. McPARTLIN and
MARSHALL A. SPOONER
Attorneys for and of Counsel for
Respondents and Defendants in Error.